Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers	)	CCB/CPD File No. 98-63
	)	
Petition of U S WEST Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA	)	CC Docket No. 98-157

Comments of the MINNESOTA CLEC CONSORTIUM

Michael J. Bradley
Richard J. Johnson
Moss & Barnett
A Professional Association
4800 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-4129

TABLE OF CONTENTS

SUMMARY ii

1. AN IXC ALREADY SERVING AN AREA MAY NOT UNILATERALLY REFUSE TO ACCEPT A CLEC's ACCESS SERVICES. 2

A. The Common Carrier Obligations of Section 201 Prevent an IXC Already Serving an Area From Declining a CLEC's Access Service. 2

B. A Refusal By IXCs Already Serving An Area To Accept CLEC Access Services At Just And Reasonable Rates Violates Section 202. 5

C. Section 214 Also Precludes IXCs From Unilaterally Declining to Provide Access Services Offered By CLECs. 6

2. SECTION 254(g) REFLECTS CONGRESS' POLICY DECISION THAT ACCESS CHARGE DIFFERENCES DO NOT JUSTIFY DEAVERAGED LONG DISTANCE RATES 7

A. Congress Required Uniform Long Distance Rates Despite Existing Access Charge Differences Between LECs. 7

B. Allowing IXCs to Discontinue Service Based On Access Charge Levels Would Violate Congress' Policy. 9

C. Transfer of Access Charges Differences To End users Would Violate Section 254(g) ... 10

3. THE MARKET-BASED APPROACHES IDENTIFIED IN THE FNPRM WOULD VIOLATE THE ACT. 11

4. REFUSAL BY NATIONAL IXCs TO INTERCONNECT WITH CLECs WILL SEVERELY IMPAIR LOCAL COMPETITION IN SMALLER COMMUNITIES. 12

5. ALLOWING IXCs TO REFUSE CLECs' ACCESS TRAFFIC WOULD PROMPT SIMILAR REFUSALS OF SMALL INCUMBENT LECs' ACCESS TRAFFIC WITH SEVERE CONSEQUENCES FOR RURAL CUSTOMERS. 13

6. THE COMMISSION MUST ESTABLISH A MECHANISM TO DETERMINE FAIR AND REASONABLE RATES FOR CLEC ACCESS SERVICES. 14

CONCLUSION 16

SUMMARY

The members of the Minnesota CLEC Consortium ("MCC") are affiliates of one or more incumbent rural telephone companies that are engaged in providing competing local exchange service in Minnesota. These comments are filed because the refusal of AT&T to accept CLEC access services at just and reasonable rates will severely impede the ability of MCC members to compete. Such refusals violate Sections 201(a), 202(a), and 214. Further, the purposes of the Communications Act and the terms of Section 251(a)(1) require that the networks of all carriers be interconnected. Arbitrary refusal to interconnect cannot be allowed.

Section 201(b) requires that the rates and charges of all carriers, including CLEC access rates, be just and reasonable. Interexchange carriers do not, however, have any right to impose any other standards as a precondition of interconnection. Section 208 provides interexchange carriers a remedy for any CLEC failure to charge just and reasonable access rates.

Deaveraging of long distance rates, whether by surcharges or other means, violate Section 254(g) and should not be allowed.

Unconstrained market based solutions will not work because small CLECs are unable to bargain meaningfully with AT&T. However, the Commission can establish streamlined processes to achieve just and reasonable rates, including the establishment of benchmarks for CLEC access rates. The rates of the large Price Cap LECs are not an appropriate benchmark because small CLECs lack similar economies of scale and because the CLEC's costs of serving rural markets are higher than a Price Cap LECs average access rates, which reflect the lower costs of serving urban areas. Rather, the access rates of any affiliated incumbent LECs or of similar sized incumbent LECs should be used to set such benchmarks.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers	)	CCB/CPD File No. 98-63
	)	
Petition of U S WEST Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA	)	CC Docket No. 98-157

COMMENTS OF MINNESOTA CLEC CONSORTIUM

The following Comments by the Minnesota CLEC Consortium ("MCC") are submitted in response to the Further Notice of Proposed Rulemaking released August 27, 1999 (the "FNPRM"). The MCC members are small competitive local exchange carriers ("CLECs") that are either currently providing or are implementing facilities based competitive local exchange service in Minnesota, including a number of smaller and rural communities Minnesota. Most of these communities currently receive local exchange service from GTE and U S WEST Communications, Inc. The members of the MCC are affiliates of one or more incumbent rural telephone companies that provide local exchange service in Minnesota.

The CLEC members of the MCC have met with unlawful demands by AT&T Corp. ("AT&T") including refusals to accept CLEC access services unless the CLECs reduce their

access charges to levels arbitrarily selected by AT&T.[1] The MCC is filing these comments because of the severe adverse impact of AT&T's such conduct by AT&T on customers of MCC members and on the ability of MCC members to compete.[2]

1. AN IXC ALREADY SERVING AN AREA MAY NOT UNILATERALLY REFUSE TO ACCEPT A CLEC's ACCESS SERVICES.

The Commission requested Comments on "whether any statutory or regulatory constraints prevent an IXC from declining a CLEC's access service." At FNPRM ¶ 242. Several provisions of the Communications Act prevent an Interexchange Carrier ("IXC") already serving an area from unilaterally declining a CLEC's access service in the same area.

A. The Common Carrier Obligations of Section 201 Prevent an IXC Already Serving an Area From Declining a CLEC's Access Service.

Under the plain language of Section 201(a), "every common carrier" has a duty to furnish "communication service upon reasonable request therefor... ."[3] The term "communication service" as used in Section 201(a) clearly includes interexchange service provided by IXCs to end users even though the final connection between the IXC and the end user is provided by a LEC. AT&T's efforts to characterize its conduct as merely a refusal to accept access services from a CLEC does not alter application of Section 201(a).

---

[1] See, Affidavits of Daryl Ecker, James Smart, and David Pratt, attached.

[2] Id.

[3] Section 201 reads in part:

> It shall be the duty of every common carrier engaged in interstate or foreign communications by wire or radio to furnish such communication service upon reasonable request therefore; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the division of such charges... ."

Section 201(a) further requires common carriers "to establish physical connections with other carriers" if the Commission, "after opportunity for hearing, finds such action necessary or desirable in the public interest."[4] The obligation to establish interconnections between carriers is a mechanism by which communication service can be provided to end users. Clearly, this obligation to interconnect applies to interconnections between IXCs and LECs.[5] There is no basis in the language of Section 201(a) to conclude that it does not apply with equal force to interconnections between IXCs and CLECs.

Under Section 201(a), the primary issues are: 1) whether a request for service is "reasonable;" and 2) whether the establishment of a physical connection between carriers is "necessary or desirable in the public interest." Section 201(a) in particular, and the Communications Act in general, establish a policy priority that services should be made available to all customers "so far as possible."[6] The goals of the Telecommunications Act of 1996 to promote competition, in particular local competition, underscore the policy of providing all customers with choices, [7] and the importance of interconnections between all carriers and all carriers' networks to the extent reasonably possible. Indeed, the specific terms of Section

---

[4] Id.

[5] See, e.g. Southern Pacific Communications v. American Tel. and Tel Co.,et al, 740 F.2d 980, 1002 (D.C. Cir. 1984), cert. denied 470 U.S. 1005.

[6] Mid-Texas Communications Systems, Inc. v. Amer. Tel & Tel. Co., 615 F2d 1372, 1379 (5th Cir. 1980) ("In general, the 'public interest' is to be considered in light of the overall purpose of the Communications Act 'to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges .... (citation omitted)").

[7] As further discussed below, it is clear that allowing national IXCs to refuse a CLEC's access services will inhibit local competition, particularly by small CLECs and by CLECs serving higher cost markets in smaller cities.

251(a)(1) require all carriers to interconnect their networks and seem to settle the issue of whether interconnection of IXC and CLEC networks is in the public interest.[8]

The factaul situation underlying the FNPRM further supports the conclusion that requests from CLEC customers for service from AT&T and other national IXCs are reasonable and that interconnection of CLEC and those IXC's networks is in the public interest. In virtually all situations, AT&T and the national IXCs already make their services available, on request, to all customers in the geographic locations in which the CLEC will provide service. For example, the MCC members provide competing service primarily in communities served by GTE and U S WEST, including many smaller communities in rural areas. AT&T and the other national IXCs already provide service in these areas. As a result, these IXCs would not be required to expand their service areas or to install extensive new facilities to provide service to CLEC customers.

Rather, the only increase in the costs of such an IXC already serving an exchange area would be the result the CLEC's access charges that may be higher than the incumbent LEC's access charges. Such added costs do not justify: 1) a refusal to accept access services from the CLEC; 2) a requirement that the CLEC's access charges be limited to the incumbent's access charges; or 3) a scheme by which end users of the CLECs (or persons calling CLEC customers) are required to pay any access charge differences and, in effect, are required to pay deaveraged long distance rates.

Instead, Section 208 provides a mechanism, and Section 201(b) provides a standard, to resolve any IXC concerns with CLEC access charges. Section 208 allows an IXC to present a complaint to the Commission if it believes that assess charges imposed by a CLEC are in any

---

[8] Section 251(a) reads in part:

> Each telecommunications carrier has the duty-
> (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; ...

way "in contravention of the provisions" of the Act. Section 201(b) provides the standard that the Commission should apply to CLEC access charges, that such charges must be "just and reasonable."[9] This is the only standard that should be applied to a CLEC's access charges, and there is no basis to enable AT&T to require that a CLEC's access charges be reduced to any other level as a precondition of interconnection with that CLEC.

B. A Refusal By IXCs Already Serving An Area To Accept CLEC Access Services At Just And Reasonable Rates Violates Section 202.

Section 202(a) reads in part:

> It shall be unlawful for any common carrier to make unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(Emphasis added.) A refusal by an IXC already serving an area to accept the access services of a CLEC at rates that meet the "just and reasonable" standard of Section 201(b), violates Section 202(a). Such a refusal is an "unreasonable discrimination . . . in charges... or services" and will "subject . . . [a] class of persons . . . to . . . undue or unreasonable prejudice or disadvantage."

The discrimination will be experienced by customers of the CLECs who will either: 1) not have access to the same interexchange services as customers who may literally reside in the same or immediately adjacent buildings (if IXCs are allowed to refuse service); or 2) incur additional charges for the same service (if surcharges are imposed to cover differences in access

---

[9] Section 201(b) reads in part:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. ...

charges between the CLECs and the incumbent LECs).[10] The protection of Section 202(a) does not depend on any formal categorization of customers.[11] Customers of CLECs are a "class of persons" that are protected from unreasonable prejudice by Section 202(a).

C. Section 214 Also Precludes IXCs From Unilaterally Declining to Provide Access Services Offered By CLECs.

Section 214 prohibits a common carrier from unilaterally withdrawing its services. Section 214(a) reads in part:

> No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; ....

(Emphasis added.) Virtually all CLEC customers were previously served by the incumbent LEC providing local exchange service in the area served by the CLEC and had service available from AT&T and other national IXCs. If the CLEC replaces the incumbent LEC as the local exchange service provider for a group of customers, and the IXC then refuses to continue service to those customers, a withdrawal of long distance service has occurred. Such a withdrawal is within the scope of Section 214 and requires prior Commission approval.

Customers receiving a particular service are "part of a community" within the meaning of Section 214.[12] Similarly, customers served by CLECs are "part of a community." By refusing to accept a CLEC's access services, which merely substitute the connection between the IXC and

---

[10] As discussed further below, such surcharges would also violate the intent of Section 254(g) and the provisions of 47 C.F.R. § 64.1801, which make no exceptions to the obligation to charge uniform long distance rates.

[11] MCI Telecommunication Corp. v. F.C.C., 627 F2d 322, 341 (D.C.Cir. 1980) (Section 202(a) applied to prevent discrimation between "early and late" customers.).

[12] ITT World Communications, Inc. v. New York Tel Co., 381 F. Supp. 113, 121 (S.D.N.Y. 1974)("[N]othing has been offered to show that 'community' does not include an economic 'community' of users, such as international record carriers or domestic satellite carriers. ... Th important cooncept of 'community' iin Section 214 I take to be the public interest."); Chastain et al v. A.T.& T., 43 FCC 2d 1079 (1973), *recon. denied* 49 FCC 2d 749 (1974).

the end-user customer, the IXC is impairing service to a "part of community", the customers receiving service from the CLEC. Such action may not be taken unilaterally by AT&T or other national IXCs already providing service to the area.[13]

2. SECTION 254(g) REFLECTS CONGRESS' POLICY DECISION THAT ACCESS CHARGE DIFFERENCES DO NOT JUSTIFY DEAVERAGED LONG DISTANCE RATES.

The Commission raised a number of issues and concerns related to differences in access charges between CLECs and Incumbent LECs. The Commission noted that requiring IXCs to bear higher access charges "may impose unfair burdens on IXC customers that pay rates reflecting these CLECs' costs even though the IXC customers may not subscribe to the CLEC," because "IXCs currently spread their access cost among all their end users." The Commission requested comments on "solutions to this problem." (FNPRM at ¶ 244). The Commission also asked "whether section 254(g) permits IXCs to charge different rates to end users within the same geographic area based upon the level of access charges levied by the end user's local exchange company." (FNPRM at ¶ 245). The Commission noted that there is no explicit prohibition on such an approach. Id. Section 254(g) resolves each of these concerns and questions.

A. Congress Required Uniform Long Distance Rates Despite Existing Access Charge Differences Between LECs.

Section 254(g) reflects an enhanced Congressional mandate that long distance rates and services, both interstate and intrastate, remain uniform in all locations. Congress was clearly

[13] Similar to Sections 201 and 202, Section 214 allows the Commission to resolve requests for discontinuance by imposing "such terms and conditions as in its judgment the public convenience and necessity may require".

aware, when it enacted Section 254(g), that access charges of many LECs in rural areas are higher than access charges of LECs in urban areas. Notwithstanding this fact, Section 254(g) reflects Congress' policy decision that an IXC's long distance rates, both interstate and intrastate, shall be the same in both urban and rural areas and between States.[14] This specific mandate is consistent with Congress' underlying policy to require comparable service at comparable rates.[15] It could hardly be more clear that Congress did not intend that IXCs be allowed to charge different rates to end user customers based on the access charges. There is no basis under either Section 254(g) or under 47 C.F.R. § 64.1801 to apply a different rate to CLEC customers or to provide less protection to those customers.

Congress concluded that the equities of maintaining average long distance rates outweighed any "unfair burdens" that might result from that policy on low-cost customers. Congress has provided the solution to the "problem." No further solution is required.

While Section 254(g) does not specifically discuss the possibility of different rates in the same area, that Section reflects Congress's conclusion that all customers should pay the same long distance rates for the same services, irrespective of the access charge differences that the IXC may be required to pay to the LECs serving those customers. Allowing IXCs to charge

---

[14] Section 254(g) reads in part:

> [T]he Commission shall adopt rules to require that the rates charged by providers of interchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to subscribers in any other State.

[15] Section 254 (b)(3) reads:

> Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

different rates to customers within the same geographic area would be even more inconsistent with Congress's policy. Such an approach should be fully rejected.

B. Allowing IXCs to Discontinue Service Based On Access Charge Levels Would Violate Congress' Policy.

Allowing IXCs already serving an area to decline to provide service on the basis of access charge differences would lead to an evasion of this clear Congressional policy. Allowing IXCs to decline CLEC access services would be a severe erosion of the level of long distance rate averaging and long distance service availability that existed when the '96 Act was passed. Such a result could hardly be further from Congress' intent to enhance protection of long distance rate averaging. Congress' intent to enhance protection of averaged long distance rates would be totally frustrated if IXCs were allowed to literally withdraw service rather than to continue to average rates.

Allowing IXCs to decline CLEC access services will lead to the anomalous result that availability of service from an IXC would vary from apartment to apartment or office to office within a building, and from house to house and business to business within a community. It is hard to imagine a greater level of long distance service and rate deaveraging.

Section 254(g) demonstrates that Congress did not intend for market based solutions based on access charge differences to override the broad public policy of nondiscrimination and uniformity of long distance rates for all customers Rather, Section 254(g) shows that Congress intended that market forces should be subordinate to the public policy objective of non-discrimination in toll services. Accordingly, a market-based solution that would allow rate discrimination would violate Section 254(g) and should not be considered.

The Commission also requested comment on whether allowing IXCs to decline service would be "consistent with the goals of section 254 of the Act that consumers in all regions of the nation have access to telecommunication services, including interexchange services?" At FNPRM ¶ 242. Allowing IXCs to decline CLEC access service would be inconsistent with the goals of Section 254(b)(3) that consumers in all regions have access to reasonably comparable services, including interexchange service, at comparable rates[16] and would lead to significant reductionsin service availability and customer choice. Consolidations of the major long distance providers enhance the adverse effects of such a practice.

C. Transfer of Access Charges Differences To End users Would Violate Section 254(g).

The Commission requested comments on "whether to provide an 'escape valve' that would allow CLECs wishing to charge more than the benchmark to collect those charges from end-users (either the called party or calling party)." At FNPRM ¶ 249. Such an escape valve is not an appropriate solution. It allows IXCs to avoid reasonable access costs by imposing them on local customers. It is the Commission's responsibility to set reasonable access charges. If the reasonable cost of service is greater than the benchmark, those costs should be charged to the IXCs.

The Commission further noted that the "'end party pays proposal' would resolve the problems associated with IXC averaging requirements, by in essence, 'deaveraging' terminating access by charging the end user, rather than the IXC, for the terminating access." At FNPRM ¶ 249. Such an approach would, in effect, deaverage the rates paid by long distance customers. Calling the charge "terminating access" would not alter the fact that it is a charge imposed on

[16] Id.

customers for making or receiving a long distance call. Consequently, such an approach would clearly violate the goals of Section 254(g).

3. THE MARKET-BASED APPROACHES IDENTIFIED IN THE FNPRM WOULD VIOLATE THE ACT.

The Commission has indicated its strong preference for a market based solutions "to constrain CLEC access rates." At FNPRM ¶ 247. Notwithstanding this preference, the market-based solutions discussed in the FNPRM would violate Sections 201, 202, 214 and 254.

Imposing surcharges on CLEC customers to cover the additional cost of access is a toll charge irrespective of whether it is referred to as an originating or terminating access charge. Changing the name of the charge and the party collecting the charge would not cure the violation of Section 254(g). The analogy to the "called party pays" approach used for some CMRS service does not support such as approach, because CMRS rates are not subject to Section 254(g).

The Commission also requested comments on whether allowing an IXC to refuse a CLEC's traffic is "a market-based solution to excessive CLEC rates that obviates the need for any regulatory action by the Commission?" At FNPRM ¶ 242.

Even if it was legal, such an approach would not provide a market-based solution because small CLECs lack the ability to bargain meaningfully with national IXCs and because the national IXCs would be enabled to misuse the market power of their long distance services in an unfair and discriminatory manner.

Small CLECs lack the resources to negotiate meaningfully with national IXCs. The volumes of traffic available to small CLECs are trivial to national IXCs and provide little or no

incentive for meaningful bargaining. AT&T has virtually refused to interconnect with small CLECs unless unreasonable and illegal concessions are made by the small CLECs. AT&T has demanded that CLECs reduce their access rates to the levels of the incumbent Price Cap LECs and grant other access charge concessions that would be unlawful and discriminatory.[17] Market based solutions will not work when the bargaining power of the parties are so completely different. Further, as discussed earlier, market based solutions that allow unilateral refusals by IXCs to serve CLEC customers would violate Sections 201, 202 and Section 214.

4. REFUSAL BY NATIONAL IXCs TO INTERCONNECT WITH CLECs WILL SEVERELY IMPAIR LOCAL COMPETITION IN SMALLER COMMUNITIES.

The Commission has requested comments on the "ramifications for the customer of the CLEC" of allowing IXCs to refuse service and "[h]ow would such a customer make or receive long-distance calls? At FNPRM ¶ 242.

The result of allowing an IXC to decline to purchase a CLEC's access service is that the CLEC's customer will be unable to obtain service from the IXC. The customer would be required to obtain service from some other IXC. For many customers, the result is that the service of the CLEC either becomes effectively unavailable (if the customer is required to use that IXC's service) or the customer may perceive that the service of the CLEC is inferior to the service of the incumbent LEC.

Many business customers require access to national IXC. Managers of local branch offices of larger companies may be required to use the services of a national IXC, whether by company-wide agreements with the IXC or by the policies established by the branch office's

[17] See, Affidavits of Daryl Ecker, James Smart, and David Pratt, attached.

upper management. If the national IXC does not accept the access services of a local CLEC, that CLEC is precluded from providing local exchange service to the branch office. Such branch offices may be extremely important to the viability of the CLEC, particularly in smaller markets.

Even for customers that are not obligated to obtain toll services from national IXCs, the customers may be unwilling to forego the services of a national IXC. (An example of such a situation is reflected in the correspondence attached to the attached affidavit of Daryl Ecker.)

Further, the inability of a CLEC to offer access to national IXCs may cause potential customers to perceive that the CLEC services are inferior to the incumbent LEC's service. Such a perception will also impair the ability of the CLECs to compete with incumbent LECs.

5. ALLOWING IXCs TO REFUSE CLECs' ACCESS TRAFFIC WOULD PROMPT SIMILAR REFUSALS OF SMALL INCUMBENT LECs' ACCESS TRAFFIC WITH SEVERE CONSEQUENCES FOR RURAL CUSTOMERS.

The Commission also requested comments on "whether an IXC can refuse to accept traffic from an incumbent LEC when there are no competitive alternatives to the LEC, e.g., a rural area with only one local exchange provider." At FNPRM ¶ 243.

Allowing IXCs to unilaterally refuse to accept a CLEC's access traffic would likely lead to similar refusals to accept access traffic from small incumbent LECs. If an IXC is allowed to refuse a CLEC's access traffic, because the CLEC's access charges "too high" from the perspective of the IXC, it seems likely that the IXC would be similarly inclined to refuse to accept access traffic from an incumbent (rural) LEC whose access charges are perceived to be "too high." As a result, the Commission should recognize that its decision in this proceeding will affect both CLECs and incumbent LECs, which may have access charges that meet the requirements of Section 201(b) but are higher than the IXCs wish to pay.

Small LECs, both incumbent and competitive, will be the most vulnerable because they lack the traffic volumes to be attractive to IXCs and the resources to engage in prolonged regulatory or legal proceedings. Allowing IXCs to refuse to accept access from incumbent LECs would reduce the quality of service from current levels and directly undercut the Congressional goal of Section 254(g) which was to enhance the preservation of uniform toll rates in all areas of the country, urban and rural.

The Commission has requested comment on the ramifications of IXC refusals to provide service for customers of incumbent LECs. At FNPRM ¶ 243.

The ramifications for a customer of an incumbent LEC whose access services are refused by a major IXC are even more severe than for the customer of a CLEC whose access service is refused, particularly if there is not CLEC offering service in the area, which is true in most rural LEC service areas. In such a circumstance, if the major IXC is currently providing service (as can be presumed) the customer of the incumbent LEC would experience a significant reduction in currently available service. The consolidation of the national IXCs would enhance the adverse effects on customers.

6. THE COMMISSION MUST ESTABLISH A MECHANISM TO DETERMINE FAIR AND REASONABLE RATES FOR CLEC ACCESS SERVICES.

Although the Commission indicated its strong preference for a marketplace solution, it recognized that legal impediments may preclude such an approach.

Reliance on Section 208 complaints, combined with benchmarks and an opportunity for an individual CLEC to establish the reasonableness of higher access rates, would allow both enforcement of the 'fair and reasonable" standards of Section 202(b) and streamlining of the process. Such an approach would allow operation of market forces and provide both IXCs and CLECs a framework for negotiation that would provide sufficient guidance to prevent most

complaints. Incumbent LEC rates within the Commission's mandates are just and reasonable.[18] CLEC rates at or below the benchmark should be presumed reasonable and should provide a defense in the context of a Section 208 complaint by an IXC.[19]

Selection of the benchmarks and the establishment of an appropriate opportunity to establish the reasonableness of higher access rates are critical.[20]

The use access rates of the incumbent LEC serving the area as a benchmark for CLEC rates would be unreasonable, particularly where the incumbent LEC is a large Price Cap LEC. Use of a large Price Cap LEC's access rates to set a benchmark for CLEC rates would be unreasonable because: a) a large Price Cap LEC has economies of scale that are not available to CLECs, particularly small CLECs; and b) large Price Cap LECs apply geographically averaged access rates calculated on at least a study area wide basis. As a result, their access rates reflect the lower cost of serving dense, urban areas that are not comparable to the costs of many smaller rural markets.

The cost of providing access service to smaller rural markets is almost certainly higher than a Price Cap LEC's average cost of providing access service. Use of a Price Cap LEC's

---

[18] The Commission asked:

> If an incumbent LEC's rates are within the Commission's mandates, should they be presumed to be just and reasonable? (FNPRM at ¶ 243)

[19] The Commission also asked:

> Should access rates be below a particular bench mark be presumed just and reasonable, thus providing CLECs with a defense in the context of a section 208 complaint? (FNPRM at ¶ 247).

[20] The Commission recognized the importance of selecting an appropriate benchmark:

> We seek comment on what rates to use as a benchmark, e.g., the incumbent LEC rate in the area served by the CLEC, or some other terminating access rate. (FNPRM at ¶ 247).
>
> We also seek comment on whether any benchmark should vary depending upon various criteria, such as, for example, whether the CLEC serves high cost areas or low cost areas. ... If parties believe that the benchmark should vary depending on various criteria, we solicit comment on these criteria, on what methodology we should use to establish alternative benchmarks, and what criteria we should use to determine what benchmark should apply to an individual CLEC. (FNPRM at ¶ 248).

averaged switched access rates could cause market distortions by discouraging competition by CLECs in smaller, rural markets even if the CLECs costs are lower in those markets because their sts of providing access may be higher than the Price Cap LEC's averaged access rates.

Rather than use the large Price Cap LEC's access rate as the benchmark, the Commission should select benchmarks of incumbent LECs that are comparable to the CLECs. For small CLECs affiliated with incumbent LECs, the access rates of affiliated incumbent LECs would be most appropriate. If the CLEC is not affiliated with a LEC, the Commission should apply the access charges of LECs that are similar in size to the CLEC.

A CLEC should have a "safety valve" ability to charge access rates higher than the bench mark if the CLEC can demonstrate to the Commission that its higher rates are fair and reasonable. A CLEC should have the opportunity to demonstrate such rates as a defense to a Section 208 complaint by an IXC.

CONCLUSION

For the reasons set forth above, the Commission should adopt rules that: 1) clarify the obligations of national IXCs to interconnect with CLECs in areas where those IXCs provide long distance service; 2) establish appropriate benchmarks for CLECs' access rates that reflect the characteristics of the CLECs, not the Price Cap LECs; such CLEC benchmarks could be based on the access rates of affiliated incumbent LECs or of comparable incumbent LECs; and 3) clarify that IXCs may not impose surcharges on long distance customers based on the access charges of the LECs or CLECs providing service to those customers.

The Minnesota Small CLECs appreciate the opportunity to submit these Comments.

Dated: October 29, 1999

Respectfully submitted,

MOSS & BARNETT
A Professional Association

By _____
Michael J. Bradley
Richard J. Johnson
4800 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-4129
(612) 347-0275

Attorneys on behalf of Minnesota CLEC Consortium

CERTIFICATE OF SERVICE

I, Shelley Davis, hereby certify that a copy of the foregoing "Comments of the Minnesota CLEC Consortium," was served on this 29th day of October, 1999, by hand delivery to the following parties:

Shelley Davis

Richard Lerner
Deputy Division Chief
Competitive Pricing Division
Common Carrier Bureau
445 12th Street, SW, Room 5-A221
Washington, DC 20054

Tamara Preiss
Competitive Pricing Division
Common Carrier Bureau
445 12th Street, SW, Room 5-A221
Washington, DC 20054

International Transcription Service
1231 20th Street, NW
Washington, DC 20036

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
	)	
Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers	)	CCB/CPD File No. 98-63
	)	
	)	

Affidavit of David A. Pratt, first being duly sworn, deposes and says:

1. I am the Director of Unregulated Operations for Tekstar Communications, Inc, dba Arvig Communication Systems (" ACS"), located at 150 2nd St SW, Perham, MN a facilities-based competitive local exchange carrier providing local exchange services in the following communities: Detroit Lakes, Battle Lake, and Henning, Minnesota.

2. We have been informed by AT&T Corp. ("AT&T") that AT&T is unwilling to provide originating interexchange toll services to our customers. AT&T representative Mr. William Taggart III has in fact advised us verbally during a phone conversation on October 27, 1999 that they will not issue an Access Service Request (ASR) to our company unless our switched access rates mirror those of the incumbent LEC (US West Communications) for the areas we are serving.

3. AT&T's unwillingness to provide interexchange toll service substantially impairs my company's ability to compete with the incumbent local exchange carriers. Prospective ACS customers of these communities have in fact told our company that they would like to buy local dial tone from ACS but wish to continue using AT&T as their long distance carrier. Until ACS can offer that carrier they are not willing to change providers.

4. We believe this will be a serious detriment to our ability to compete with the incumbent local exchange carriers to serve these customers.

5. We are awaiting a proposed Switched Access Service Agreement for review. AT&T asserts that the terms of that Switched Access Service Agreement are "proprietary".

Further you Affiant saith not.

Dated: Oct. 27, 1999

SWORN TO BEFORE ME this
27th day of October, 1999

JOSIE M. WINKELS
NOTARY PUBLIC—MINNESOTA
My Commission Expires JAN. 31, 2000

NOTARY PUBLIC

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
	)	CC Docket 96-262
Access Charge Reform	)	
	)	

Affidavit of Daryl Ecker

Daryl Ecker, first being duly sworn, deposes and says:

1. I am the President of Otter Tail Telcom, Inc. ("Otter Tail Telcom"), located at 224 West Lincoln Avenue, Fergus Falls, Minnesota 56537. Otter Tail Telcom is a facilities-based competitive local exchange carrier providing local exchange services in Fergus Falls, Minnesota.

2. We have been informed in verbal communications by AT&T Corp ("AT&T") that AT&T is unwilling to provide originating interexchange toll services to our customers.

3. AT&T's unwillingness to provide interexchange toll service impairs Otter Tail Telcom's ability to compete, as reflected in the attached correspondence from Sue Lewis of Pat Hanley Sales explaining her inability to switch to Otter Tail Telcom because of the lack of service from AT&T.

4. We believe that other customers will have a similar reaction to the unavailability of service from AT&T, which will impose a serious detriment to our ability to compete with U S WEST Communications, Inc. to serve these customers.

Further you Affiant saith not

Dated: October 28, 1999

Daryl Ecker

SWORN TO BEFORE ME this
28th day of October, 1999

JOYCE A. SCHUELLER
Notary Public
Minnesota
My Commission Expires Jan. 31, 2005

NOTARY PUBLIC

Pat Hanley Sales, Inc.

1800 N. 1st Ave.
PO Box 1036
Fergus Falls, MN 56537
Telephone 218.736.6964
Fax 218.736.3669

October 28, 1999

Otter Tail Telcom, LLC
Daryl Ecker
224 Lincoln Ave. W.
Fergus Falls, MN 56537

Dear Mr Ecker:

Thank you for visiting with us about the opportunities you could provide to us as a local provider of telephone service. It was interesting to hear of the many new services being provided by Otter Tail Telcom and the fact that you are a locally owned company was also of great interest to us. Unfortunately, the inability to keep AT&T as our long distance carrier was a determining factor in our decision to remain with our current local service provider. If Otter Tail Telcom can offer AT&T at some point in the future. Please contact us again.

Sincerely,

Sue Lewis

Sue Lewis
Information Systems Manager

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
	)	CC Docket 96-262
Access Charge Reform	)	
	)	

Affidavit of James Smart

James Smart, first being duly sworn, deposes and says:

1. I am the General Manager of NorthStar Access, L.L.C. ("NSA"), located at 440 Eagle Lake Road N, P O Box 207, Big Lake, Minnesota 55309. NSA is a facilities-based competitive local exchange carrier providing local exchange services in the following communities: Princeton, Cambridge, Elk River, Anoka, Coon Rapids, Blaine, White Bear Lake, Stillwater, Forest Lake, North Branch and Mora, Minnesota.

2. We have been informed by AT&T Corp. ("AT&T") that AT&T probably will not provide originating interexchange toll services to our customers if our access charges are higher than the incumbent local exchange provider. Although we have exchanged requested information with AT&T, to date we have not received any firm response.

3. AT&T's unwillingness to provide interexchange toll service substantially impairs my company's ability to compete with the incumbent local exchange carriers. We have had customers decline our local service because their main office had a contract with AT&T to provide toll services and we could not provide that interconnection.

4. We believe this will be a serious detriment to our ability to compete with the incumbent local exchange carriers to serve these customers.

Further you Affiant saith not.

Dated: 10/28/99, 1999

SWORN TO BEFORE ME this
28th day of October, 1999

Carolyn M. Fowler
NOTARY PUBLIC